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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. MCKINNIE, *et al.*,

Petitioners,

—v.—

TENNESSEE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

REPLY BRIEF FOR PETITIONERS

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioners

CHARLES L. BLACK, JR.
CHARLES STEPHEN RALSTON

Of Counsel

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REPLY BRIEF FOR PETITIONERS

On December 14, 1964, after petitioners' brief was filed, this Court decided *Hamm* v. *City of Rock Hill*, 379 U. S. 306. The purpose of this reply brief is to discuss the applicability of that decision, and to reply to arguments made by the Respondent.

I.

The Civil Rights Act of 1964 Abates These Prosecutions.

After certiorari was granted in this case,[1] and after petitioners' brief was filed, this Court held in three cases that the Civil Rights Act of 1964, Title II, requires that convictions in pending prosecutions similar to this one be vacated and the indictments dismissed. *Hamm* v. *City of Rock Hill* (and *Lupper* v. *Arkansas*), 379 U. S. 306; *Blow* v. *North Carolina*, —— U. S. L. Week —— (Feb. 1, 1965). These

[1] 379 U. S. 811, October 12, 1964.

decisions rested on the ancient common law doctrine of abatement, and on the language and purposes of the Act, including particularly §203(c).[2] We respectfully submit that notwithstanding the fact that these decisions were not unanimous (see dissenting opinions in *Hamm*, 379 U. S. at 318, et seq.), the holding of the Court with respect to the meaning and effect of this important act of Congress should now be accepted as *stare decisis*. Tennessee has not challenged the basic ruling of *Hamm, supra*, but has attempted to show that this case is different (State's Brief, pp. 5-8).

We contend that the State's attempted distinctions fail, and that a holding distinguishing *Hamm* on the grounds suggested on this record would substantially undermine the effectiveness of the Civil Rights Act as applied to criminal convictions for acts done before and since passage of the Act.

First, it should be noted that Tennessee has not argued that the B & W Cafeteria is not a place of public accommodation covered by the Act. It assumes the contrary (State's Brief, p. 5), as South Carolina and Arkansas did in the *Hamm* case (379 U. S. at 309-310).[3]

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[2] §203(c) provides:

"No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202."

See also §§201(b)(2) and (c)(2) of the Civil Rights Act of 1964.

[3] The correctness of this assumption is clear, since it is uncontradicted that the cafeteria was open to the general public (R. 94), and hence "offers to serve interstate travelers." Section 201(c)(3), Civil Rights Act of 1964. The indictment alleged that the B & W Cafeteria Inc., was "a restaurant and cafeteria, elaborately furnished and equipped, . . . in the heart of the business, commercial and uptown district of Nashville, Tennessee, . . . with a large seating capacity for customers . . . [and a] reputation as serving

Second, it is undisputed that petitioners sought and were denied enjoyment of the goods and services of the cafeteria solely because of their race; the cafe manager (among others) flatly testified to this (R. 94-95). The State's present assertions that this is not a case involving racial discrimination are so patently contrary to the evidence, the indictment, the State's own theory at trial, and the proceedings at every stage of the trial as to be unworthy of serious consideration.[4] Time and again states have made such arguments to this and other courts, but only rarely has it been attempted on a record so permeated with the race question from first page to last on the State's own theory of the trial.[5] The claim is all the more bizarre in this case where the law used to convict petitioners was admitted candidly by a contemporary Tennessee Supreme Court to have been "an extraordinary statute" "passed to avoid the supposed effects of an act of Congress on the same subject, known as the civil rights bill" of 1875. *State* v. *Lasater*, 68 Tenn. 584, 585 (1877).[6]

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fine foods and which said cafeteria daily served hundreds of white patrons, customers and clientele (R. 2). The manager testified that "adjacent and nearby" businesses were a jewelry store, a furrier, the Eastern Airlines office, the Cross Keys Restaurant and the Hermitage Hotel (R. 89); and that the capacity is 450 customers (R. 88).

[4] See, for example, R. 1-5.

[5] In a celebrated case where the pretense of racial neutrality was maintained from the start, Judge Wisdom of the Fifth Circuit wrote that it "was tried below and argued here in the eerie atmosphere of never-never land." *Meredith* v. *Fair*, 298 F. 2d 696, 701 (5th Cir. 1962); see also, *Meredith* v. *Fair*, 305 F. 2d 343, 345 (5th Cir. 1962).

[6] The indictment charged petitioners, among other things, with a conspiracy to violate Tenn. Code Section 62-711. It also mentioned Section 62-710. Petitioners argue (see Part IV, *infra*) that the jury was erroneously instructed that they were charged with violating this law as well. Sections 62-710 and 62-711, respectively, were originally sections 1 and 2 of the Act which may be found

Thirdly, in conjunction with the new posture of racial neutrality, the State argues that the *Hamm* case is inapplicable because, it is asserted, petitioners did not behave in a "peaceful manner" and their conduct is unlawful without regard to the race issue (State's Brief, p. 5). There are multiple answers to this contention. They may be summarized by stating that the record and a reasonable construction of the Civil Rights Act of 1964 do not support the assertion, and that in any event, considering the accusation, jury instructions and evidence, the jury's general verdict does not necessarily, or even probably, indicate that the jury believed that petitioners were not "peaceful."

We submit that the record demonstrates that the conduct of petitioners was within the statement in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311, that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution." Needless to say, this Court is not bound by the State Supreme Court's characterizations of the facts or prevented from making its own "independent examination of the whole record" in deciding the federal claim. *Edwards* v. *South Carolina*, 372 U. S. 229, 235; *Blackburn* v. *Alabama*, 361 U. S. 199; *Pennekamp* v. *Florida*, 328 U. S. 331, 336.

Such an examination shows clearly the following. Petitioners sought entry to the B & W Cafeteria on October 21, 1962. They attempted to go into the cafeteria, but were prevented from doing so because the doorman blocked en-

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in Acts of Tenn., 39th Gen. Assembly, 1875, Ch. 130, pp. 216-217 (passed March 23, 1875; approved March 24, 1875). There have been only minor changes since the original enactment: (a) the parenthetical phrase—"(except railways, street, interurban and commercial)"—was added to section 1; (b) minor stylistic changes in both sections.

The Act was an immediate response to the federal Civil Rights Act of 1875 which was approved March 1, 1875 (18 Stat. 335).

trance through the inner doors of the vestibule (R. 271, 100-101, 228-229). Clearly they would have gone in and obtained service if they had been allowed to do so (R. 94, 100-101, 289-290).[7] The record is completely devoid of any evidence that petitioners had planned, or wished, to block the entrance. Therefore, this case is certainly not one of a deliberate obstruction of an entry way in order to disrupt business. Any obstruction or inconvenience to white customers was incidental to their unsuccessful demand for service.

Indeed, all the evidence supports the conclusion that the real cause of the obstruction of the doorway was the doorman's refusal to allow petitioners to move out of the vestibule and into the cafeteria (R. 100-101, 165, 228-229). Petitioners allowed numerous customers to pass by them, conduct not compatible with a deliberate scheme to interfere with the B & W's business (R. 91-93, 109, 164). Even the evidence that petitioners were "pushing and shoving" (R. 168, 169, 214, 278-280) is explained largely by testimony that this was caused in part by white patrons coming through the crowded vestibule (R. 175-177, 279-280). There was nothing more than the casual jostling normally encountered in crowded public places. Petitioners could have forced entry if they had wished, considering the age and size of the doorman (see Petitioners' Brief, p. 6), but as the doorman admitted, they did not try "to fight their way in" (R. 228). It would be hard to think of an example of a non-forcible attempt to gain entry, if this is not one. Petitioners standing at the door represented the only way open to them at the time to nonviolently request service.

[7] Even the testimony of witnesses that one of petitioners said, "When we get there, just keep pushing. Do not stop. Just keep on pushing," indicates that they wished to go into the cafeteria, and did not want to prevent others from doing so (R. 210-211, 219-222).

If admitted they would have purchased food. The cafeteria employees' conduct prevented them from ordering food.

Examining the occurrences as if they had taken place after enactment of the Civil Rights Act of 1964 illuminates the problem. The restaurant employees would obviously violate their duties under the Act by blocking petitioners' entry. By standing in the vestibule and thus continuing to seek entry, petitioners, asserting rights under the Act, might by their presence make it more inconvenient for white customers to enter. But surely the policy of the Civil Rights Act would prevail over any incidental inconvenience to customers coincident with and directly flowing from wrongful action of the restaurateur in defiance of the Act. We submit that this is exactly the type of situation Vice President (then Senator) Humphrey envisioned when he explained that the bill meant that "a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State courts must entertain defenses grounded upon these provisions . . . " (Cong. Rec., May 1, 1964, p. 9463; and see *Hamm, supra,* 379 U. S. at 311). A contrary holding would invite nullification of the Act by hostile prosecutors and fact finders. And, of course, this does not mean that the Act affords a shield for really violent conduct, any more than it was ever suggested by courts which supported the view that proprietors could exclude for racial reasons that the right of self-help excused such violence by restaurateurs.

However, even if the foregoing analysis is not accepted, that is by no means the end of the matter because in light of the manner in which the case was presented to the jury, the general verdict of guilty does not indicate that the jury believed that petitioners were not acting in a peaceful, nonviolent manner. (Matters pertinent to this are argued ex-

tensively below in connection with the arguments about the trial judge's instruction to the jury and the nature of the indictment.) Indeed, the jury could have followed its instructions and nevertheless convicted if it merely believed that petitioners tacitly agreed to challenge the proprietor's right to exclude Negroes,[8] or that they tacitly agreed to seek service nonviolently but knowing that they ran the risk of being attacked by white bystanders or patrons.[9] Surely the case was never presented to the jury with instructions to determine merely whether petitioners used violent means or deliberately blocked the door to assert their own lawful right to enter against a proprietor who was lawlessly excluding them. The case was presented to

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[8] The judge read Section 62-710, conferring a right to exclude Negroes (R. 298); read the indictment which embraced that theory (R. 292-296); told incorrectly that the petitioners were charged with violating Section 62-710 on three separate occasions (R. 299, 302, 305); and also told (in defining acts "injurious" to restaurant trade or business as used in the conspiracy statute (§39-1101(7)) that injurious "generally means in law, invasion or violation of legally protected interest or property right of another" (R. 300).

(Note that the court refused to give requested instructions that the restaurant had no right to exclude racially (R. 310). What is more it also deleted the key language of another requested instruction that might have made it clear that petitioners' mere agreement to seek entry even though the cafeteria had a policy of refusing to serve Negroes was not unlawful. Compare requested instructions at R. 307 (deleted language in brackets) with actual instruction at R. 311.)

[9] The indictment, which was read with approval to the jury during the instructions by the Court contained an allegation that defendants did certain acts "well knowing that their presence as 'sit-ins' was likely to promote disorders, breaches of the peace, fights or riots *by patrons, customers and clientele of such segregated cafeteria*" (R. 295, emphasis supplied). The indictment also asserted that previous sit-ins had "resulted in fights, breaches of the peace, disorders, brawls and riots" (R. 295). This invited conviction on a theory, obviously unconstitutional under *Garner* v. *Louisiana*, 368 U. S. 157, and *Wright* v. *Georgia*, 373 U. S. 284, 292, that petitioners' acts were unlawful because they knew that others might attack them.

the jury on precisely the opposite basis, by a jury charge which included a reading of the indictment and Code Section 62-710 with approval of the legal theories therein (R. 292-296, 298, 300, 302, 305). To view the matter another way, and make it more than obvious, no one could reasonably contend that the indictment or charge to the jury were proper if they had taken place after passage of the Civil Rights Act of 1964. Any conviction after enactment of Title II that was based on such an accusation or such a jury instruction would be summarily reversed. The pre-act conviction based on such a case falls by the same token because based on a general verdict arrived at by a jury erroneously instructed as to the law.

II.

Petitioners' Convictions Were an Enforcement of Racial Discrimination by State Action in Violation of the Fourteenth Amendment.

The State's brief makes no attempts to give a direct answer to petitioners' arguments based on the Fourteenth Amendment. However, a few additional remarks are appropriate.

Tennessee has by its laws and administrative regulations directly encouraged and required segregation in violation of the principles set forth in *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *Greenville*, 373 U. S. 244; *Robinson* v. *Florida*, 378 U. S. 153; and *Fox* v. *North Carolina*, 378 U. S. 587.

First, we have mentioned above that the laws used to convict petitioners were passed by Tennessee in 1875 in an attempt to evade the Civil Rights Act of 1875 dealing with

public accommodations.[10] The judicial acknowledgment of this is corroborated by the fact that the Tennessee law paraphrased in exactly the same order the categories of accommodations covered by the federal act passed that same month.[11] This was certainly an admitted state encouragement of racial discrimination in restaurants, which are expressly mentioned in the act's second section (now §62-711). But beyond this the State has taken administrative action to *require* segregation, as was brought to this Court's attention in *Turner* v. *Memphis*, 369 U. S. 350, 351. The *Turner* case involved Regulation No. R-18(L) of the Division of Hotel and Restaurant Inspection of the State Department of Conservation providing:

> Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises.[12]

Violation of this regulation was a misdemeanor punishable by fine pursuant to Tennessee Code Section 53-2120.

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[10] See Note 6 above and accompanying text. *State* v. *Lasater*, 68 Tenn. 584, 586 (1877).

[11] This is also a repudiation of the assumption made in *The Civil Rights Cases*, that common law protected access to places of public accommodation, but although a Tennessee case was involved the law apparently passed unnoticed by the court (109 U. S. 3, 24). After the *Civil Rights Cases, supra*, Tennessee grew bolder and explicitly declared the right to segregate in certain places of public accommodation. See Tenn. Code Ann. Section 62-715 (derived from Acts 1885, ch. 68, §4).

[12] The quotation of the regulation is taken from the printed record in this Court in *Turner* v. *Memphis*, 369 U. S. 350, Oct. Term, 1961, No. 84, Record pp. 7, 19-20.

To be sure, the above-mentioned statute and regulation were held unconstitutional in *Turner* v. *Memphis*, 369 U. S. 350, 353 (March 26, 1962), some 7 months before petitioners in this case were arrested. However, petitioners submit that the provisions represent such a clear and unequivocal state endorsement of the desirability of segregation as to be at least the legal equivalents of the invalid state encouragement of segregation in *Robinson* v. *Florida*, 378 U. S. 153, and *Fox* v. *North Carolina*, 378 U. S. 587. Indeed, even the segregation ordinance involved in *Peterson* v. *Greenville* was clearly a nullity at the time the arrests in that case took place under the same precedents cited for invalidating the Tennessee provisions in *Turner* (369 U. S. at 353).

III.

Petitioners Were Convicted on a Record Containing No Evidence of Guilt Contrary to *Thompson* v. *Louisville*, 362 U. S. 199.

It is submitted that the State has not sufficiently rebutted petitioners' argument that there was no evidence sufficient to find them guilty of a conspiracy to violate the statutes mentioned in the indictment. The argument that there is no evidence supporting the charge that they conspired to obstruct the restaurant unlawfully has been detailed in the plaintiffs original brief and in part I of this brief above. However, it should also be emphasized that there was no evidence of a conspiracy to commit "turbulent or riotous conduct."[13] The Court below defined "riotous" by refer-

[13] It should be noted that the conspiracy conviction carried with it a jail term as well as a fine, penalties much more severe than those for a simple violation of Section 62-711. But *State* v. *Lasater*, 68 Tenn. 584, 586 (1877) the Court said that the penalties in §62-711 itself were "severe, more so than in other kindred offenses" but overturned a trial court decision that the $100 fine and $500 forfeiture under the act were a cruel and unusual punishment.

ence to the dictionary as "having the nature of a riot or disturbance of the peace" (R. 319).[14] In the same paragraph the court relates this to the problem of proving a conspiracy. There was plainly no evidence in the case that any actual riot occurred or that there was any breach of the peace. The Court's conclusion that petitioners' conduct met its definition might have adopted the unconstitutional theory in the indictment (R. 4), that petitioners' actions might have provoked an attack by others.[15] Cf. *Wright* v. *Georgia*, 373 U. S. 284, 292-93. Otherwise there is no evidence that the petitioners conspired to cause a riot. Petitioners raised both the "no evidence" and a vagueness claim (R. 17-18, 21, 22, 25) expressly relying on the Fourteenth Amendment.

IV.

Petitioners Were Substantially Prejudiced by the Trial Judge's Erroneous Instructions to the Jury Concerning §62-710 of the Tennessee Code.

The State contends that the Trial Judge's error in the charge to the jury was "in the nature of a typographical or clerical error as obvious to the jury as to counsel for the petitioners" and hence was harmless (State's Brief, pp. 13-14).

The suggestion that the trial judge's error was a mere inadvertence comparable to a slip of the tongue is readily subject to refutation. To start with the judge did not

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[14] In *State* v. *Lasater*, *supra*, the only prior construction of the law that has come to our attention, the law was held applicable to an allegation that a defendant engaged in "quarreling, committing assaults and batteries, breaches of the peace, loud noises, and trespass upon a hotel."

[15] See Note 8 *supra*.

merely tell the jury once that petitioners were charged with conspiring to violate §62-710. He told them this three times. In addition, he not only read the statute to the jury, he also read the grand jury presentment which relied on the statute and indeed made a variety of references to restaurateurs' purported right to exclude Negroes. The harmful potential of this coupled with the instruction that a conspiracy under the law included injury to a "legally protected interest or property right" (R. 300) is patent. The fact that the trial judge denied contrary instructions also shows that the error was not an inadvertence.

We submit that the instructions under §62-710 could have led a jury of laymen to believe that they could find petitioners guilty solely because they sought to induce the cafeteria to serve them by nonviolently challenging its segregation policy established pursuant to §62-710. The Court below said "the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section" (R. 321). That is exactly what was wrong with reading the statute to the jury. It asserted that the proprietor's racial policy was valid and relevant—a theory, incidentally at odds with the pretense that race was not involved in the case.

The emphasis on §62-710 in the indictment and jury charge is at the heart of the invitation to the jury to decide the case on a variety of unconstitutional grounds such as those mentioned in the text accompanying notes 7 and 8 above. This requires reversal of the convictions under *Stromberg* v. *California*, 283 U. S. 359.

The State also argues that petitioners failed to object when the instruction was given, and cites the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 119-120. However, the decision

there involved and turned on a rule of federal procedural law, and is therefore inapplicable. Neither the Supreme Court of Tennessee (R. 321) nor the State in its brief (pp. 13-14) pointed to any Tennessee authority that would establish that petitioners failed to raise the issue properly by requesting a contrary instruction,[16] followed by citing the erroneous instruction in its motion for a new trial (18-19).[17] Moreover, the Tennessee Supreme Court only mentioned that no questions were raised about the propriety of reading the section, and then proceeded to decide on the merits that the error was harmless. Quite possibly the Court thought that this passing mention supported its harmless error holding and intended no procedural implication at all. Since the state court, if it considered the matter procedurally, exercised an apparent discretion to decide the issue, there is no reason for this Court to decide that it is barred

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[16] See R. 310. Defendants' Special Request No. 4 sought to have the jury instructed that Section 62-710 could not constitutionally form the basis of enforcing a policy of racial segregation or exclusion through a criminal action.

Apparently, under Tennessee law the requesting of an instruction in opposition to the one given is a sufficient objection. Cf., *Arterburn* v. *State*, 208 Tenn. 141, 344 S. W. 2d 362 (1961); *Crawford* v. *State*, 197 Tenn. 411, 273 S. W. 2d 689 (1954); *Powers* v. *State*, 117 Tenn. 363, 97 S. W. 815 (1906).

Moreover, the appellate courts do have discretion to rule on the validity of an instruction even where no contrary request has been made. See, *Potter* v. *State*, 85 Tenn. 88, 1 S. W. 614 (1886); *King* v. *State*, 83 Tenn. 51 (1885). This is particularly the case where the judge's error has been an *affirmative* one, as was the case here. Thus, in *Burgess* v. *State*, —— Tenn. ——, 369 S. W. 2d 731 (1963) the trial judge had charged the jury by reading them the language of a statute that had been passed after the defendant had committed the offense. The Supreme Court of Tennessee reversed, even though no special request for a different instruction, or apparently any other objection, had been made. Thus, under the rule of *Williams* v. *Georgia*, 349 U. S. 375, this court is not barred from deciding the question.

[17] The record does not indicate what, if any, other opportunities were given petitioners to object to the erroneous instruction.

from also determining the question.[18] *Williams* v. *Georgia*, 349 U. S. 375; *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339.

V.

Petitioners Were Denied Due Process Because the Appellate Review of Their Convictions Did Not Conform to the Rule of *Cole* v. *Arkansas*, 333 U. S. 196.

Petitioners have argued that the appellate review afforded below did not conform to due process because their convictions were not appraised "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U. S. 196, 202. The State has replied that the Tennessee Supreme Court found an independent ground to support the judgment even assuming, as petitioners contended, that the racial policy of the cafeteria was illegal, and that in so holding the state court merely followed the usual appellate principle of avoiding the unnecessary decision of constitutional questions. The State relies on *Garner* v. *Louisiana*, 368 U. S. 157, and *Hormel* v. *Helvering*, 312 U. S. 551.

We submit that neither the reasoning nor the authorities[19] cited by the State refute petitioners' argument that the ap-

[18] See Note 16 *supra*. In addition, *Stromberg* v. *California*, 283 U. S. 359, and *Terminiello* v. *Chicago*, 337 U. S. 1, indicate that even if there had been a failure to properly object, this would not bar the challenging of an erroneous instruction where the error was sufficiently prejudicial.

[19] *Garner* v. *Louisiana*, 368 U. S. 157, was a case where the Court reversed convictions and freed convicts, finding it unnecessary to reach all their claims. This is a quite different matter from sending men to jail without deciding their properly presented constitutional claims by seizing on a theory directly contrary to that upon which the jury was instructed to decide the case.

Hormel v. *Helvering*, 312 U. S. 552, was a civil tax case where the Court recognized the general rule that appellate courts should not consider issues never raised below in order that parties may

pellate court unfairly sustained their convictions on a ground not litigated.

The Tennessee Supreme Court said that: "Stripped of any question of race and discrimination, the act complained of is still unlawful" (R. 324). Aside from the fact that one must disregard the facts to strip the case of race issues, the problem with this is that the jury never considered the facts "stripped of any question of race and discrimination," and the defense never had notice of or opportunity to defend against any such charge. The issues of whether petitioners used illegal means to enter a place they had a right to enter was never put before the jury, and was not fairly presented by the indictment. It was decided by the Supreme Court of Tennessee in the first instance. Thus petitioners were convicted "upon a charge not made" a "sheer denial of due process" *DeJonge* v. *Oregon*, 299 U. S. 353, 362.

Cole v. *Arkansas*, 333 U. S. 196, 201, emphasizes that notice of the specific charge and a right to be heard at trial of the issues raised by the charge is essential to a fair trial. If petitioners had notice of this quite different charge, their cross-examination and argument might have been different. Indeed, faced with such a charge defense counsel might have evaluated the risks differently and found it prudent to call on the defendants to testify in their own defense. This determination alone can vitally affect the outcome of a trial.[20] As the charge was actually framed,

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have an opportunity to offer evidence on the relevant issues. But recognizing that the rule was not inflexible, the Court found that in the particular case an injustice would result if the case was not decided on the basis of the correct rule of law as embodied in statute not mentioned before the Board of Tax Appeals. We submit that in this case the failure to apply the *general rule* stated in *Hormel, supra*, has resulted in an injustice to petitioners whose liberty is at stake.

[20] A defendant's failure to testify obviously may have an impact on the jury even if it is admonished not to hold his failure against him.

and the case actually tried the tactical considerations for defense counsel were quite different because the state's case at trial flatly rested on the premise that state judicial enforcement of racial segregation did not violate the Fourteenth Amendment. Defense counsel might very reasonably stake the defense on the belief that this proposition was wrong (Cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; and the concurring opinions in *Bell* v. *Maryland*, 378 U. S. 226), but they might well have taken an entirely different view of defense tactics and put on defensive proof if faced with a charge that the defendants used illegal means of self-help in support of a lawful right to enter the premises.

In *Russell* v. *United States*, 369 U. S. 749, 766 the Court made it clear that the reasoning of *Cole* v. *Arkansas*, *supra*, was not limited to the case where an appellate court explicitly switched statutes on a defendant.[21] In reversing because of a vague indictment the court said (369 U. S. at 766):

> "It enables his conviction to rest on one point and the affirmance on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v. *Arkansas*, 333 U. S. 196, 201, 202."

In *Garner* v. *Louisiana*, 368 U. S. 157, this Court rejected a request that it do something similiar to what was done by the Tennessee Court. Louisiana argued that although defendants were convicted of disorderly conduct, the real issue was whether the record proved the elements of a criminal trespass. The Court rejected the argument on the authority of *Cole*, *supra*. *Garner* v. *Louisiana*, 368 U. S. 157, 164.

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[21] This occurred in *Shuttlesworth* v. *Birmingham*, 376 U. S. 339.

Here the Tennessee Supreme Court convicted the defendants on a charge that the trial jury never considered and which the grand jury never made. *Cole* v. *Arkansas, supra; Stirone* v. *United States,* 361 U. S. 212.

The prosecution thus attempts, we think unfairly, to get the benefit of the emotionally charged segregation issue before a favorably disposed jury (see Argument VI, *infra*), while attempting to cleanse the case of the race issue for review in this Court, in the face of adverse precedent (*Hamm* v. *Rock Hill,* 379 U. S. 306).

VI.

Petitioners Were Denied Due Process Because the Jury Which Convicted Was Not Impartial or Indifferent on a Central Matter Presented to the Jury.

Petitioners have argued from the very beginning that they were denied due process because the jury which tried them was prejudiced against them as evidenced by the jurors' admitted life-long practice, custom and philosophy of racial segregation.[22] The relationship of this point to the objection to the indictment and its references to the cafeteria's segregation policy under Section 62-710 was pointed out to the trial court during the jury selection process (R. 59-60, 63).

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[22] Only a portion of the lengthy *voir dire* proceedings to select the jury have been printed in the record in this Court (R. 29-87), however, the entire original record in typewritten form is on file in this Court. In addition to the general objection, the motion for new trial (R. 24-25) raised particular objections to jurors Wm. T. Moon, Wendell H. Cooper and Herbert Amic, reiterating objections made during the *voir dire* itself. Moon and Cooper were seated after all of petitioners' peremptory challenges were exhausted; others were seated over petitioners' protests that challenges for cause were improperly denied though they declined to use their limited number of peremptory challenges.

The State's brief in this Court argues first, that there was no showing that the jurors were prejudiced about an issue that was involved in the case, and second, that the jurors stated that their opinions were not so fixed that they could not try the case impartially.

The State's first point is patently erroneous. The case was presented to the jury by the indictment and the judge's instructions as a case centrally concerned with the question whether petitioners conspired to deprive the cafeteria of its explicitly assumed right to exclude Negroes. The case was submitted to the jury on an instruction exactly contrary to the *arguendo* assumptions made by the Tennessee Supreme Court, and the ruling of *Hamm* v. *Rock Hill,* 379 U. S. 306, *i.e.,* that petitioners had a right to service and the proprietor no right to exclude them. Note that the jurors' prejudice was not a mere "mistake of law" as urged by the state; their prejudice was about what the law *should be* and their view was that restaurants should be allowed to discriminate racially. The prejudice was expressed in these terms by juror Amic, and was plainly implicit in the testimony of the others who believed in and practiced segregation in every area of their daily lives.

But this Court has held that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd,* 366 U. S. 717, 722. The fair jury is a basic requirement of due process. In *Irvin* the Court quoted with approval Lord Coke who said "a juror must be as 'indifferent as he stands unsworne' Co Litt 155b" (366 U. S. at 722)

In answer to the state's second point, *Irvin* v. *Dowd, supra,* makes it plain that while it is sufficient that a juror can lay aside his impression or opinion and render a verdict on the evidence, this rule does not foreclose inquiry even if every juror says that notwithstanding his opinion

he can render an impartial verdict, and holds that "impartiality is not a technical conception" (366 U. S. at 723-724). In *Irvin* the Court held the trial unfair because a variety of evidence such as newspaper comment and reporting of the crime demonstrated a "pattern of deep and bitter prejudice against" the defendant (*Id.* at 727). The evidence of the pattern of segregationist belief in this case came from the jurors and veniremen themselves, as one after another the white jurors expressed this view and every Negro juror was either excused for cause or peremptorily challenged by the state.

Juror Amic, after telling the Court that he could be impartial (R. 61-62) practically returned to his earlier expression (R. 62):

> Q. Wait just a minute—please, sir. That if evidence was shown in this case—that if the indictment charges that the defendants went there, knowing of this rule and the defendants, being Negroes, sought service, that it would prejudice you against them?
>
> A. Well, it would have to be shown to me that it was—that they did violate some regulation like that.
>
> • • • • •
>
> Q. But, if they had a rule that they excluded Negroes, and these defendants went there and violated that rule, it would prejudice you against these defendants, wouldn't it?
>
> A. If—if it was a proven fact that that was their rule, and that they were there against the cafeteria's rule, why I think they have a right to enfore (sic) that rule.
>
> Q. And you would start out with that prejudice against the defendants, wouldn't you?
>
> A. Not necessarily, not until it is proven exactly they did violate the rule and violate some law.

In particular it was argued that juror Herbert Amic was erroneously held competent, despite petitioners' objections, after testifying that he believed a business open to the public should be allowed to exclude Negroes; that in such a case he would start out with a prejudiced attitude toward the petitioners; and that the cafeteria would be right in its position (R. 56-57).

Petitioners were denied a jury which was "impartial" and "indifferent" on the principal issue presented to it for decision by the instructions and indictment. It is reasonably inferable that the prosecutor prepared the indictment emphasizing race in order to exploit the segregationist attitudes of local jurors. The state may not now avoid the consequences of that decision.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioners

CHARLES L. BLACK, JR.
CHARLES STEPHEN RALSTON

Of Counsel